FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-234

In The

Supreme Court of the United States

October Term, 1989

JAKE CRATER, SR.

Petitioner,

versus

MESA PETROLEUM COMPANY, ET AL.

Respondent.

On Writ Of Certiorari Or Review To The Third Circuit Court Of Appeals For The State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

JEANSONNE AND BRINEY
CRAIG W. MARKS
P. O. Box 91410
Lafayette, LA 70509
(318) 237-4070

Attorney For Respondent, MESA Petroleum Company

LOUISIANA LAW BRIEF PRINTING CO., INC. (504) 523-0064
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the Trial Court and the Louisiana Third Circuit erred in holding that Louisiana State Workmen's Compensation Laws were not pre-empted by the LHWCA through the OCSLA with respect to an injury to a Louisiana State worker on a fixed platform on the Outer Continental Shelf, Offshore of Louisiana.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 4
ARGUMENT 4
I. FACTS 4
II. THE LAW 6
III. ARGUMENT 15
CONCLUSION 21

TABLE OF AUTHORITIES

Page

Crater vs. Mesa Petroleum Company, 539 So. 2d 88 (La. 3rd Cir., 1989) writ denied, No. 89-C-0813, 89-C-0822 (La, May 12, 1989) 15

Colorado Anti-Discrimination Commission vs. Continental Air Lines, Inc., 372 U. S. 714, 83 S. Ct. 1022, 10 L. Ed. 2d 84 (1963) 20

Director, Officer of Workers' Compensation Programs, U. S. Department of Labor vs. Perini North River Associates, 459 U. S. 297, 309 (1983) 9

Exxon Corporation vs. Governor of Maryland, 437 U. S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) 20

Ferri vs. Ackerman, 444 U. S. 193 (1979) 12

Fleet Arrowspace Corp. vs. Holderman, 848 F. 2d 720 (U. S. 6th Cir., 1988) 17

Garvin vs. Alumax of South Carolina, Inc., 787 F. 2d 910 (U. S. 4th Cir., 1986) 10, 14, 15, 19

Gates vs. Shell Oil, 812 F. 2d 1509 (U. S. 5th Cir., 1987) 17, 18

Hails vs. Atlantic Richfield Company, 595 F. Supp. 984 (D. C. La., 1984) 6

Jenkins vs. McDermott, Inc., 734 F. 2d 229 (U. S. 5th Cir., 1984) 15, 17, 18

Lewis vs. Modular Quarters, 508 So. 2d 975 (La. 3rd Cir., 1987) 13, 14, 15, 19

Logan vs. Louisiana Dock Company, Inc., No. 88-C-1506 (La., January 30, 1989) 7, 8, 10, 18, 19

TABLE OF AUTHORITIES – Continued

Page

Metropolitan Life Insurance Company vs. Massachusetts, 471 U. S. 724 (1985) 8

No East-West Highway Committee, Inc. vs. Chandler, 767 F. 2d 21 (U. S. 1st Cir., 1985) 17

Rice vs. Sante Fe Elevator Company, 331 U. S. 218 (1947) 8

Sunship, Inc. vs. Pennsylvania, 447 U. S. 715, 100 S. Ct. 2432, 65 L. Ed. 2d 458 (1980) 9, 10, 14

Thompson vs. Teledyne Movable Offshore, Inc., 419 So. 2d 822 (La.,1982) 6, 15, 16, 19

No. 89-234

In The

Supreme Court of the United States

October Term, 1989

JAKE CRATER, SR.

Petitioner,

versus

MESA PETROLEUM COMPANY, ET AL

Respondent.

On Writ Of Certiorari Or Review To The Third Circuit Court Of Appeals For The State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Mesa Petroleum Company, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed herein by Jake Crater, Sr.

STATEMENT OF THE CASE

This matter is before this Honorable Court on an Application for Writ of Certiorari filed on behalf of the petitioner and plaintiff, Jake Crater. Petitioner's writ

application has its origin in a Motion for Summary Judgment filed on behalf of this respondent, Mesa Petroleum Company. Specifically, Mesa Petroleum filed the aforementioned Motion for Summary Judgment seeking summary judgment on all claims by the petitioner against Mesa.

In very simple terms, it is/was the contention of Mesa no issues of material fact existed relative to Mesa Petroleum's status as the statutory employer of Mr. Crater pursuant to certain provisions of Louisiana's Workers' Compensation Statute. Accordingly, Mesa Petroleum is immune from any tort liability to Mr. Crater under that statute.

In support of its Motion, Mesa Petroleum Company submitted several exhibits into evidence. These exhibits included (1) a copy of the "Operating Agreement" from Block 381, Vermilion Area, Offshore, Louisiana between Mesa Petroleum and Sante Fe Energy Company, dated December 1, 1989; (2) a copy of the "Master Service Contract", dated March 18, 1980 between Mesa Petroleum and B. J. Hughes Sand Control (Mr. Crater's employer); (3) plaintiff's petition; (4) the deposition of Mr. Crater; (5) Interrogatories propounded by the plaintiff in responses thereto by Mesa Petroleum; (6) the Affidavit of James C. Cooper, plaintiff's supervisor; (7) the Affidavit of Guy A. Thibodeaux, Senior Production Engineer of Mesa Petroleum.

After hearing the arguments of counsel, reviewing the briefs submitted by all concerned parties and the evidence submitted into the record in connection with this matter, the Honorable Isom J. Guillory, District Judge

for the 27th Judicial District Court, St. Landry Parish, in written reasons, dated March 22, 1988, on finding the law and the evidence in favor of Mesa Petroleum, granted summary judgment in favor of Mesa dismissing plaintiff's claims against Mesa Petroleum with prejudice and at plaintiff's costs. Those written reasons are attached hereto as Appendix A.

The plaintiff and Intervenor, National Union Fire Insurance Company, took an appeal to the Louisiana Third Circuit, contending the decision of the Lower Court was incorrect and should be reversed. In denying the plaintiff's appeal and upholding the Trial Court's decision, the Louisiana Third Circuit rejected plaintiff's suggestion that Louisiana Law, including Louisiana's Workers' Compensation Statute, should not apply under the facts of the case. After weighing what was perceived as a "tension between the LHWCA and State Workers' Compensation Schemes", the Court concluded that a defendant may assert those defenses available under the Louisiana Workers' Compensation Act and those areas where the Act and the LHWCA apply concurrently. The Louisiana Third Circuit's opinion is contained within plaintiff's Writ Application as Appendix B at Page A-5.

Plaintiff and Intervenor then applied for rehearing to the Third Circuit arguing essentially, in part, the same position as is reflected in this Writ of Certiorari Application. That petition for rehearing was denied by a vote of two to one. The plaintiff and Intervenor next sought a Writ of Certiorari to the Louisiana Supreme Court, again arguing, essentially, in part, the same argumenis as are

presented by this Writ Application. Without written reasons assigned, and by a vote of four to two, the Louisiana Supreme Court denied the aforesaid Writ Application.

SUMMARY OF ARGUMENT

The District Judge and the Louisiana Third Circuit did not err in granting summary judgment in favor of Mesa Petroleum Company dismissing, with prejudice, plaintiff's claims against Mesa as Mesa is immune from any tort liability to the plaintiff pursuant to Louisiana's Workers' Compensation Statute.

ARGUMENT

It is respectfully submitted that the Trial Court and the Louisiana Third Circuit were correct in concluding that Mesa Petroleum Company, under the facts of this case, was entitled to assert the "statutory employer" defense available under Louisiana Law. As such, Mesa Petroleum feels it necessary to provide the Court with a more detailed statement of the case's facts so as to give meaning to its opposition to this Writ Application.

I. FACTS

On May 13, 1983, Jake Crater, Sr., employed by B. J. Hughes Sand Control as a bulk hand, was working on a fixed platform operated by Mesa Petroleum Company and located in Vermilion Block 381, in the Gulf of Mexico, off the Coast of Louisiana on the Outer Continental Shelf.

At the time of the accident, a self-contained platform rig, Nicklos Rig #82, owned and operated by co-defendant, Nicklos Drilling Company, was located on the platform. Basically, the plaintiff's injuries occurred as B. J. Hughes' crew, including the plaintiff, was setting up their sand control equipment in preparation of doing work on that location.

Mr. Crater was living in Lake Charles and working for B. J. Hughes Sand Control out of its Lake Charles office at the time of the accident. He had been working for B. J. Hughes since approximately August or September, 1982. On December 1, 1979, Mesa Petroleum entered into a contractual arrangement with Santa Fe Energy Company concerning the exploration for and production of hydrocarbon products in the Gulf of Mexico off the Coast of Louisiana in Vermilion Block 381. Within that contract Mesa contractually obligated itself to act as operator and pursue exploration for and production of hydrocarbon products in Vermilion Block 381.

On the date of the accident, B. J. Hughes Sand Control was working on the Mesa Platform in Vermilion Block 381 pursuant to a contract between it and Mesa Petroleum Company dated March 18, 1981. As indicated, at the time of the accident, the B. J. Hughes' crew was in the process of setting up their equipment on the platform in preparation of doing sand control work pursuant to that contract. Specifically, on the aforementioned date, the Nicklos #82 rig was being used to complete the Vermilion 381 A-6 well. At that time, B. J. Hughes Sand Control was employed to "gravel pack" the well while it was being completed. This process is intended to impede the influx of sand while allowing production of flow.

Accordingly, Mesa is entitled to statutory employer status under applicable Louisiana law. Since Mr. Crater was injured while executing work Mesa had contracted to perform and subcontracted to have done by his direct employer, Mesa is immune from this suit and entitled to summary judgment.

II. THE LAW

As indicated, the incident in suit occurred on a fixed platform on the Outer Continental Shelf off the Coast of Louisiana. Pursuant to the terms of the Outer Continental Shelf Lands Act, Section 1333, the law of the adjacent state, to the extent such law is not inconsistent with Federal Law, applies as "surrogate" federal law to platform such as Eugene Island 208E. See *Hails vs. Atlantic Richfield Company*, 595 F. Supp. 984 (D. C. La., 1984).

In 1982, the Louisiana Supreme Court held that the Longshoremen and Harbor Workers Act (LHWCA) is not the exclusive remedy for a worker whose injury occurred on an oil platform on the Outer Continental Shelf off the State of Louisiana. See *Thompson vs. Teledyne Movable Offshore, Inc.*, 419 So. 2d 822 (La., 1982). The *Thompson* Court held that the Louisiana Workmen's Compensation Act could constitutionally apply to an injury received on a fixed platform in the Gulf of Mexico, some four miles off the Coast of Louisiana.

Specifically, the *Thompson* case involved a worker who was injured while employed on a fixed platform located on the Outer Continental Shelf off of Louisiana. The plaintiff therein sued for compensation benefits under the Louisiana Workers Compensation Act, and his

employer filed an exception of lack of jurisdiction over the subject matter, asserting the plaintiff's sole remedy was under the LHWCA. The issue was whether a worker hired in the State of Louisiana and injured while working on a fixed platform located on the Outer Continental Shelf beyond the territorial waters of the State of Louisiana was entitled to recover Louisiana compensation benefits notwithstanding his entitlement to benefits under the LHWCA.

To resolve that issue, the Court determined that the OCSLA, Section 1333(b), does not dictate that the LHWCA is the *only* Compensation Act that can be applied to instances of disability or death to an employee on the shelf. Further, the Court found no incompatibility between the Louisiana State Compensation Scheme and LHWCA insofar as their co-existence beyond Louisiana's territorial waters was concerned.

Specifically, the Court stated:

> "We conclude that the LHWCA is not the exclusively applicable worker's compensation statute for injuries occurring on the Outer Continental Shelf. Such exclusivity is neither mandated by Federal Statute, by legislative history, nor by incompatibility with State Law."

Based thereon, the Court determined the plaintiff, although injured while working on a fixed platform on the Outer Continental Shelf outside the territorial waters of Louisiana was entitled to receive State Compensation Benefits.

More recently, in *Logan vs. Louisiana Dock Company, Inc.*, No. 88-C-1506 (La., January 30, 1989), the Louisiana Supreme Court again had opportunity to confront the

issue of whether the LHWCA pre-empts application of Louisiana Workers' Compensation Statute. In this regard, the *Logan* Court held Louisiana's Workers' Compensation Act could constitutionally apply to an injury received on a dock or shorebased facility within Louisiana's territorial limits.

Specifically, the *Logan* case involved a worker who was injured while performing repairs to a barge on his employer's dry docks located in the Mississippi River at New Orleans. The plaintiff therein sued for compensation benefits under Louisiana's Workers' Compensation Act, and his employer answered challenging the jurisdiction of the Trial Court in addition to asserting other defenses. As designated by the Louisiana Supreme Court, the issue was whether the Trial Court had subject matter jurisdiction over the plaintiff's claim under Louisiana's Workers' Compensation Act or whether his State claim is pre-empted by the LHWCA.

In resolving that issue, the Court stated that the potential availability of a federal remedy did not necessarily foreclose the injured worker's claim for relief under State Law. Specifically, the Court stated:

> " . . . Absent federal pre-emption, Louisiana is free to extend *Logan* (the claimant) the protection of its worker's compensation laws. It is well established that federal pre-emption of State Law will not be found without a clear expression of congressional intent, and there is a strong presumption *against* finding pre-emption. See, e.g. *Metropolitan Life Insurance Company vs. Massachusetts*, 471 U. S. 724, (1985); and *Rice vs. Sante Fe Elevator Company*, 331 U. S. 218 (1947). . . . The U. S. Supreme Court has also noted that in cases of doubt concerning the

> applicability of State Compensation Law relative to the LHWCA, the question should be resolved in favor of the constitutionality of the State remedy. See *Director, Officer of Workers' Compensation Programs, U. S. Department of Labor vs. Perini North River Associates,* 459 U. S. 297, 309 (1983)." Id. at Pages 3 and 4 (emphasis added).

Noting that the LHWCA contained no expressed declaration of congressional intent to prohibit states from providing compensation to injured workers in lieu of, or in addition to, the LHWCA, the Supreme Court concluded the statute and its history "militates in favor of finding concurrent jurisdiction." Id. at Page 5.

In so ruling, the Court found the Lower Court of Appeal had erred in finding pre-emption mandated by the LHWCA. Specifically, the Louisiana Supreme Court felt pre-emption was contrary to the U. S. Supreme Court's interpretation of the LHWCA in *Sunship, Inc. vs. Pennsylvania,* 447 U. S. 715, 100 S. Ct. 2432, 65 L. Ed. 2d 458 (1980). The Court stated,

> " . . . We find nothing in the text of the LHWCA to support the broad pre-emption claims of the (Louisiana) Fourth Circuit below: State and federal compensation laws are complimentary, not contradictory; there is no evidence from the LHWCA of congressional intent to pre-empt state law; and, as noted above, Section 905 was designed not to pre-empt state remedies but to abolish non-LHWCA federal claims by injured longshoremen. Our conclusion that the concurrent jurisdiction is a better rule is supported by the scholarship on this issue. . . . A clear majority of the commentators, however, find concurrent jurisdiction is the better rule for a variety of legal and policy reasons. We agree. As a policy

> matter, it would be 'undesirable in the highest degree' to return to the notion that federal and state jurisdiction over claims such as *Logan's* are mutually exclusive. . . . Louisiana has a very important interest in assuring (that its citizens) who work in hazardous maritime related activities, are fully compensated for their injuries. . . . Accordingly we find concurrent jurisdiction as the better rule and should be applied to the fullest extent permissible." Id. at Pages 6 and 7.

The *Sunship* decision cited by the Louisiana Supreme Court in *Logan* was decided after the 1972 Amendments to the LHWCA which extended federal jurisdiction landward. Within that decision, this Court held that the enlarged jurisdiction supplemented rather than supplanted State Compensation Law. *Sunship* stated that the concurrent jurisdiction continued, and the amended LHWCA was not exclusive. *Sunship, supra,* at 447 U. S. 720.

Two Courts have recently confronted the issue at hand. Specifically, the U. S. Fourth Circuit in *Garvin vs. Alumax of South Carolina, Inc.*, 787 F. 2d 910 (U. S. 4th Cir., 1986), ruled that an injured longshoreman could not pursue a tort claim against a contractor which owned the piece of equipment that injured the plaintiff because that contractor was entitled to immunity under the South Carolina Worker's Compensation Statute as the plaintiff's statutory employer.

Mr. Garvin was employed by Lemm Corporation/ Operations which operated the terminal at which the plaintiff was working. The defendant, Alumax, was a lessee of the terminal and owner of an unloading machine installed on the terminal's pier.

While performing routine maintenance work on the unloading machine, the plaintiff came in contact with some electrically energized parts and was injured. He sued Alumax as owner of this machine, and Alumax moved to dismiss the claim on the ground that it was the statutory employer of the plaintiff under South Carolina's Workmen's Compensation Act.

The Lower Court denied the Motion, reasoning that since the LHWCA affirmatively extended immunity only to a contractor which was procured compensation insurance, that Statute and the South Carolina Worker's Compensation Statute were repugnant and the LHWCA took precedence under the supremacy clause.

Finding no repugnancy between the LHWCA and the South Carolina Compensation Act, the Fourth Circuit reversed and held that Alumax was entitled to the immunity conferred it by South Carolina Law. Interestingly enough, the Fourth Circuit did so even though the plaintiff had pursued compensation benefits under the LHWCA. According to the Fourth Circuit, the issue was whether the plaintiff's choice limited the defenses available to the party he had sued on the tort claim.

First, the Fourth Circuit discussed the intention of Congress in enacting the LHWCA. Noting that it was necessary for Congress within the LHWCA to deal in some fashion with employer immunity, the Court felt "nothing done in the Congress suggest that it intended to modify immunities provided general contractors by State Workmen's Compensation Laws, when those laws are applicable."

The Court felt that LHWCA set up some procedural rules but did not create any cause of action against third parties (other than a vessel related cause of action) or *define circumstances affecting rights of an injured to prevail in actions against third parties.*

Then, referring to *Ferri vs. Ackerman,* 444 U. S. 193 (1979), the Fourth Circuit quoted language by the U. S. Supreme Court related to a third party claim by an LHWCA recipient:

> "When State Law creates a cause of action, the State is free to define the defenses to the claim, including the defense of immunity, unless the State rules in conflict with Federal Law."

The Fourth Circuit concluded there was a conflict between the LHWCA and South Carolina's workmen's compensation related immunity defense because Congress had not purported to prescribe immunity rules to be applied by States in action based on State Law claims. In so deciding, the Court reasoned that Federal immunity applies to federal claims, but when a claim is based on State Law, State Law rules of immunity should apply.

Commenting that, "the Federal and State Statutes are readily harmonized, and each may function in its own sphere without interference with the other, "the Court concluded there was no conflict between the differing rules of immunity within the LHWCA and the South Carolina Statute. Accordingly, Alumax was entitled to urge the "statutory employer" immunity defense.

Further, prior to its decision in this matter, the Louisiana Third Circuit even more recently, confronted the

issue at hand and held that a defendant sued by a plaintiff receiving longshoreman compensation benefits is entitled to assert the statutory employer defense available under Louisiana Law since the accident occurred in a place where both the LHWCA and Louisiana Compensation Statute would apply. In *Lewis vs. Modular Quarters*, 508 So. 2d 975 (La. 3rd Cir., 1987), the plaintiff filed suit for damages incurred as a result of injuries sustained in a work related accident. Named as defendants were Modular Quarters, Universal Fabricators, Inc. (Unifab) and Abbeville Lumber Company.

Unifab moved for summary judgment, asserting that it was immune from suit as the statutory employer of the plaintiff. After a hearing, the Trial Court granted Unifab's Motion for Summary Judgment, finding that the pleadings and depositions established no genuine issue as to the fact that Unifab was the statutory employer of the plaintiff, and therefore, plaintiff's exclusive remedy under Louisiana Law was limited to worker's compensation benefits and Unifab was immune from suit in tort by plaintiff.

On appeal, plaintiff argued the Trial Court erred in granting the summary judgment because there was a genuine issue as to whether the plaintiff was a longshoreman for purposes of the LHWCA. Essentially, plaintiff argued that if he was covered under the LHWCA then the "statutory employer" immunity provided under Louisiana Worker's Compensation Law would not apply to the case at hand.

After noting that the conflict between the provisions of the Louisiana Worker's Compensation Law, specifically the "statutory employer" immunity provided by LSA-R.S. 23:1032 and 23:1061 and the LHWCA was "obvious," the *Lewis* panel, referred to the U. S. Supreme Court decision of *Sunship, Inc. vs. Pennsylvania*, 447 U. S. 715, 100 S. Ct. 2432, 65 L. Ed. 2d 458 (1980). In that case, the Supreme Court held that the LHWCA is to be applied concurrently with State Worker's Compensation schemes.

Ultimately, the *Lewis* panel concluded that in view of the history of the LHWCA as set forth by the U. S. Supreme Court in *Sunship, supra*, that Court (the Louisiana Third Circuit) could "discern no intent by Congress to negate the available defenses provided by State Law to third party claims brought pursuant to State Law." Since the plaintiff's claim against Unifab was clearly brought under State Law, not Federal Law, the Court affirmed the Lower Court's granting of summary judgment in favor of Unifab.

In so ruling, the *Lewis* Court relied heavily on the *Garvin, supra*, decision. After discussing the facts of the *Garvin* case, the *Lewis* Court noted that, "the well reasoned decision in *Garvin, supra*, more properly reflects the views of the *Lewis* Court regarding the tension between the LHWCA and State Worker's Compensation schemes." Further, the *Lewis* Court specifically relied on the *Garvin* decision in concluding there was no intent by Congress to prevent a defendant from using available defenses provided by State Law, including State compensation schemes, to third party claims even though the injured party may also be covered by the LHWCA.

III. ARGUMENT

In deciding whether the LHWCA through the OCSLA pre-empted application of Louisiana's Workers' Compensation Statute in this matter the Louisiana Third Circuit relied upon the *Thompson* decision, *supra; Garvin* decision, *supra* and the *Lewis* decision, *supra*. After again emphasizing that it could "discern no intent by Congress to negate the available defenses provided by State Law to third party claims brought pursuant to State Law", the Court pronounced, as in *Lewis*, that a defendant may assert those defenses available under the Louisiana Workers' Compensation Act in those areas where that Act and the LHWCA apply concurrently. See *Crater, supra* at A-10 of Appendex B of petitioner's Writ Application.

In response to plaintiff's arguments, the Louisiana Third Circuit noted that it was "not swayed" by the decision cited by plaintiff such as *Jenkins vs. McDermott, Inc.*, 734 F. 2d 229 (U. S. 5th Cir., 1984). In rejecting those arguments, the Court, quoting from *Lewis, supra*, again stated:

> "We find, even though it (*Garvin*) conflicts somewhat with the decision in *Jenkins, supra* and *Poche, supra*, the well reasoned decision in *Garvin, supra*, more properly reflects the views of this Court regarding the tension between the LHWCA and State Worker's Compensation schemes." (*Crater, supra* at A-10 of Appendix B of petitioner's Writ Application.

As such, the Court found the Trial Court did not err when it ruled that Mesa was entitled to assert the statutory defense provided by the Louisiana Compensation Act.

Plaintiff has argued the exclusivity of federal law on the Outer Continental Shelf where an injured employee chooses LHWCA benefits. In this regard, the Court must keep in mind that the plaintiff and the compensation carrier for his employer are suggesting to the Court that they, by deciding either jointly or separately, as to whether the employee will receive state or federal compensation benefits thereby control the defenses available to a third party tort defendant in a tort action brought by the injured employee.

Specifically, the plaintiff would impose some significance to the fact that he opted to recover compensation benefits under the LHWCA rather than Louisiana's Compensation Statute (to which he is available as pointed out in the *Thompson* decision, *supra*); however, Mesa would note to the Court that whether a plaintiff has sought compensation benefits is not relevant to the defenses available to any defendant sued in a tort claim. Rather, the critical inquiry is under what law the tort claims have been brought.

In this case, Mr. Crater has sued Mesa Petroleum under Louisiana's negligence theories applied to accidents on the Outer Continental Shelf through the OCSLA. Certainly, if Mr. Crater is entitled to sue Mesa based on a State cause of action, Mesa should be entitled to defend the suit with available State law defenses. Certainly, payment of State compensation benefits is not and has never been a pre-requisite for asserting "statutory employer" immunity under the applicable State statute.

In arguing that the decision of the Trial Court and the Louisiana Third Circuit should be reversed, plaintiff/

petition has relied heavily on two decision, *Gates vs. Shell Oil*, 812 F. 2d 1509 (U. S. 5th Cir., 1987) and *Jenkins vs. McDermott, Inc.*, 734 F. 2d 229 (U. S. 5th Cir., 1984). It is respectfully submitted that contrary to the plaintiff's contentions, those cases do not provide this Court with reason to grant a Writ of Certiorari and reverse.

With regard to the *Jenkins* decision, *supra*, Mesa would note that the decision was vacated. Specifically, on petitions for rehearing and suggestions for rehearing *en banc*, see 742 F. 2d 191 (U. S. 5th Cir., 1984), the original Panel which decided *Jenkins*, granted the petitions for Panel rehearing and vacated the original Panel opinion insofar as it reversed the summary judgment dismissing the plaintiff's negligence and strict liability claims against the defendant, McDermott. The Panel then remanded the matter to the District Court for further proceedings on those claims. As such, the discussions contained within the original Panel decision on the issues at hand can not be considered controlling in this matter. See *No East-West Highway Committee, Inc. vs. Chandler*, 767 F. 2d 21 (U. S. 1st Cir., 1985); *Fleet Arrowspace Corp. vs. Holderman*, 848 F. 2d 720 (U. S. 6th Cir., 1988).

Further, from a factual standpoint, *Jenkins* is readily distinguishable. In this regard, the case did not deal with a tort claim brought under the OCSLA. Instead, the emphasis of the Court dealt with whether Mr. Jenkins was engaged in maritime employment at the time of his injuries so as to entitle him to coverage under the LHWCA. The Court ultimately concluded plaintiff's work activity (i.e., assisting in the fabrication of an offshore drilling platform destined for use off the shores of Africa) was maritime employment. Whether Mr. Crater possesses

employee "status" is not at issue in this case since the question of whether his work was maritime or not has not been raised. Accordingly, *Jenkins* provides no support for plaintiff's writ application.

Plaintiff has offered no reason to support his argument that *Gates, supra,* should control save his argument that federal pre-emption is required. As has previously been presented to the Court, it is respectfully submitted that the better rule, as reflected in the cases cited herein, would allow for concurrent jurisdiction. Quoting from the Louisiana Supreme Court's decision in *Logan,* the following comments again succinctly state why federal pre-emption should not be the rule.

> "It is well established that federal pre-emption of State law will not be found without a clear expression of congressional intent, and there is a strong presumption against finding pre-emption. . . . The U. S. Supreme Court has also noted that in cases of doubt concerning the applicability of State compensation law relative to the LHWCA, the question should be resolved in favor of the constitutionality of the State remedy (citing *Perini, supra),*" *Logan, supra* at Pages 3 and 4.

> "We find nothing in the text of the LHWCA itself to support the broad pre-emption of claims of the (Louisiana) Fourth Circuit below: State and federal compensation laws are complementary, not contradictory; there is no evidence from the LHWCA of congressional intent to pre-empt State laws; and, as noted above, Section 905 was designated not to pre-empt State remedies but to abolish non-LHWCA federal claims by injured longshoremen. Our conclusion that the concurrent jurisdiction is a better rule is

> supported by the scholarship on this question. . . . Accordingly, we find concurrent jurisdiction as the better rule and should be applied to the fullest extent permissible." Id at Pages 6 and 7.

This attitude is shared by the U. S. Fourth Circuit which, in *Garvin, supra,* when considering the intention of Congress in enacting the LHWCA stated, "nothing done in the Congress suggest that it intended to modify immunities provided general contractors by State Workmen's Compensation Laws, when those laws are applicable." *Garvin, supra* at Page 917.

Commenting that, "the federal and state statutes are readily harmonized, and each may function in its own sphere without interference with the other," the U. S. Fourth Circuit concluded there was no conflict between the differing rules of immunity within the LHWCA and South Carolina's Workers' Compensation Statute which provided statutory employer immunity. *Garvin, supra* at Pages 917-918.

Accordingly, the applicable law in this case originating out of State Court in Louisiana and as set forth in *Thompson, supra; Logan, supra* and *Lewis, supra,* is that a defendant may assert those defenses available under Louisiana's Workers' Compensation Act in those areas where that Act and the LHWCA apply concurrently. The decision by the Louisiana Third Circuit in *Crater* is completely consistent with the aforecited cases as well as the *Garvin* decision, *supra,* out of the U. S. Fourth Circuit.

This Court has admonished in the past to not seek out conflicts between Federal and State laws "where none

clearly exists" or to strike down laws under the Supremacy Clause when application of State law will not frustrate Federal law. *Exxon Corporation vs. Governor of Maryland*, 437 U. S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978); *Colorado Anti-Discrimination Commission vs. Continental Air Lines, Inc.*, 372 U. S. 714, 83 S. Ct. 1022, 10 L. Ed. 2d 84 (1963).

It is respectfully submitted that both Congress and this Court has diligently attempted to preserve State law control over State law third party claims regardless of whether the claimant has received LHWCA or State compensation benefits. That attitude should continue with the denial of plaintiff's Writ Application in this matter.

CONCLUSION

In summary, it is respectfully submitted that as the claims against Mesa Petroleum in this matter are premised exclusively on State law, Mesa may assert those defenses available to it under Louisiana's Compensation Statute in those areas where that Act and the LHWCA apply concurrently. Such a rationale is completely consistent with the better reason and more persuasive jurisprudence on the subject originating out of Louisiana and the U. S. Fourth Circuit. As such, the decision of the Trial Court and the Louisiana Third Circuit is correct, should not be reversed and plaintiff's Application for Writ of Certiorari to this Court should be denied.

Respectfully submitted,

JEANSONNE AND BRINEY

/s/ Craig W. Marks
CRAIG W. MARKS (8923)
Post Office Box 91410
Lafayette, Louisiana 70509
(318) 237-4070

APPENDIX

REASONS FOR JUDGMENT

JAKE CRATER, SR.	:	NO. 84-0967-C, CIVIL DOCKET
VS.	:	27TH JUDICIAL DISTRICT COURT
MESA PETROLEUM, ET AL.	:	ST. LANDRY PARISH, LOUISIANA

What the Court is considering in this matter, through a Motion for Summary Judgment, is the "statutory employer" concept.

Lewis, 508 So.2d 975 at the time of trial of the Motion was on writs to the Supreme Court. The Supreme Court has now affirmed the Third Circuit; and, while Lewis would seem, on the surface, to be in conflict with, perhaps, some Federal decisions, it can be reconciled through Berry, 488 So.2d 934, which is discussed in Lewis.

Berry, in this Court's opinion, leaves a lot to subjective evaluation, and each case will have to be examined subjectively on its own facts.

Be that as it may, Lewis is so close on the facts to the present case, it must govern; unless the Higher Court sees fit to distinguish it on the facts, through Berry.

Accordingly, the Motion is granted.

Counsel for Mover will prepare the proper Judgment, mail a copy to opposing counsel for approval as to form, in writing, and present the Judgment for signature.

Opelousas, Louisiana, this 22 day of March, 1988.

/s/ Isom J. Guillory, Jr.
DISTRICT JUDGE

cc: Raleigh Newman
H. Lee Lewis, Jr.
Gregory P. Massey
Craig W. Marks
James E. Diaz, Sr.
John K. Hill
Owen M. Goudelocke

Filed March 22, 1988

/s/ Laura Noel
Dy. Clerk

A TRUE COPY

Laura Noel